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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES SNYDER COMPANY, INC.; EBELING AND HICKS, INC.; CLARENCE GLEESON, INC.; and LEO J. VANDERVENNET AND SONS, INC.,
Petitioners

v.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA; BARTON-MALOW CO.; DARIN & ARMSTRONG, INC.; R. E. DAILEY & CO.; THOMAS E. DAILEY; A. Z. SHMINA & SONS, CO.; DETROIT BUILDING EMPLOYERS LABOR COUNCIL; STANLEY E. VEIGHEY; JOHN W. LANZETTA; FRANK D'AGOSTINO; AND JOHN MCCOY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Did the Court of Appeals err in determining that the District Court must find, as a matter of law, the existence of a conspiracy by a preponderance of the evidence before allowing consideration of co-conspirators' statements in a civil case?

II. Did the Court of Appeals err in ruling that, following a determination that a defendant is not within the labor exemption from the antitrust laws, a plaintiff must nevertheless show predatory intent directed against the specific business of a plaintiff in addition to the usual elements of an antitrust violation?

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Petitioners, James Snyder Co., Inc., Ebeling and Hicks, Inc., Clarence Gleeson, Inc., and Leo J. Vandervennet and Sons, Inc., respectfully pray that a Writ of Certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

PROCEEDINGS BELOW

Petitioners commenced this case in the United States District Court for the Eastern District of Michigan, Southern Division on July 27, 1970. In 1976, summary judgment in favor of certain defendants was granted and affirmed upon appeal, 546 F.2d 206 (6th Cir. 1976). Trial began for the remaining defendants but at the conclusion of the plaintiffs' proof the district court entered a directed verdict for the defendants. The opinion of the district court is set forth at App. B, *infra*, at 31a. The Court of Appeals for the Sixth Circuit affirmed on April 29, 1982. 677 F.2d 1111 (6th Cir. 1982). The opinion of the court is set forth at App. A, *infra*, at 1a.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered April 29, 1982. This Petition for Certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Antitrust Laws

Section 1 of the Sherman Act:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal:. . . . (15 U.S.C. 1)

Section 4 of the Clayton Act:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (15 U.S.C. 15)

STATEMENT OF THE CASE

Petitioners filed this class action to recover treble damages and obtain injunctive relief for the injuries sustained by them and others similarly situated as a result of violations of the federal antitrust laws by the Respondents and certain trade unions. Respondents have conspired with the trade unions participating in a multi-trade, multi-employer agreement to impose the terms of the wage agreement on Petitioners in violation of Section 1 of the Sherman Act.

Petitioners are independent masonry contractors. They are also members of the Detroit Mason and Construction Association ("DMCA"), made up of the principal employers of bricklayers in the Metropolitan Area of Detroit. In addition to bricklayers, Petitioners also hire laborers (bricktenders) and other workers involved in the masonry construction business. Traditionally, the DMCA, on behalf of its members and other masonry subcontractors, has individually negotiated labor agreements with unions representing both the bricklayers and the laborers.

The principal Respondent is the Detroit Chapter of the Associated General Contractors of America ("AGC"). Its members are primarily general contractors engaged in building commercial and industrial properties. The AGC conducts labor negotiations and bargains in such negotiations on behalf of its member contractors. In regard to masonry work, its members both subcontract work to Petitioners on the basis of bids and, on other occasions, directly employ masons and related laborers.

Respondent Thomas E. Dailey is the President of Respondent R. E. Dailey and Co. and was the director of AGC in 1970. In that capacity, he was a member of the employer bargaining team which participated in the collective bargaining negotiations (hereinafter "Negotiations") involved in this action. In addition, he was the principal architect of and driving force behind the multi-trade bargaining agreement which is the subject of this lawsuit (hereinafter "Agreement").

The other Respondents include corporations that executed powers of attorney to AGC to bargain in their behalf; the Detroit Building Employers Labor Relations Council, known as the Construction Employers Council ("CEC"), composed of members of major employer groups except for the DMCA; and individuals involved in the Negotiations. On February 17, 1970, these Respondents and others executed a multi-trade, multi-employer bargaining agreement that fixed wages and fringe benefits for, among other trades, all bricklayers and laborers in the Metropolitan Detroit Area. Petitioners and others similarly situated did not participate in the Negotiations nor were they parties to the Agreement.

From at least 1968 until the Agreement was negotiated on February 17, 1970, the general contractors, working through their association, AGC, established as the primary objective for the 1970 negotiations a multi-trade, multi-employer agreement. Toward that end the Construction Employers Council was formed. The CEC consisted of approximately 26 employer groups. Respondent Dailey as the former President and Director of AGC, and Stanley Veighey, Director of Labor Relations for the AGC, were principally responsible for the efforts of the CEC.

Various meetings were held during 1969 between the AGC and CEC representatives and members of the trade unions, including Jack Wood, Secretary of the Greater Detroit Building Trade Council, toward the end of achieving multi-trade, multi-employer bargaining for the forthcoming 1970 negotiations.

On February 6, 1970, a format was agreed upon between the CEC and the trade unions. Paragraph 3 of the format provided there would be "no prior settlements with employers not participating in the multi-trade bargaining, who employ members of the participating unions." The bargaining unit was also appointed.

The first bargaining session—and as it turned out, the only bargaining session—was scheduled for February 16, 1970. The

union initially demanded a $2.00 per hour wage package increase; the first dollar per hour to take effect at the expiration of the then-current contract and the second dollar per hour to take effect on June 1, 1971. This demand came at a time when the building industry was in a recession and was higher than the amount granted the unions in 1968 bargaining, which Mr. Dailey had considered absolutely excessive.

The employer representatives were startled by the demand, believing it to be highly unreasonable. Apparently, the union representatives also felt this was a high figure. However, knowing how badly the contractors and the associations were interested in multi-trade, multi-employer bargaining, the unions were prepared to make them pay extra to get the multi-trade concept off the ground.

Despite both the high money amount and the fact it would apply to all trades across the board, including laborers, the employer bargaining group agreed to accept the $2.00 an hour package. They did so because they believed it was the price they had to pay for multi-trade bargaining. This was done in a single session although, in the past, negotiations had taken weeks or even months to be completed.

Both Dailey and Veighey believed that multi-trade and multi-employer bargaining could not be sustained if the unions were to settle with any other employer groups except on the same terms and conditions contained in the multi-trade bargaining agreement. The effect on and reaction of other employer groups not a party to the negotiations, more specifically the Petitioners and the class represented, were discussed in detail by the employer negotiators at four caucuses during the bargaining session. The Respondents discussed how the Agreement would "hurt" Petitioners and others.

The employer group was warned by the unions that it should not settle with any other unions not parties to the Agreement on different terms. Mr. Veighey stated that the employer negotiators were willing to rely on the good faith of the unions

to do likewise—not settle with other employer groups on different terms. He stated further that if either the employers or the unions were to settle with nonparticipants on different conditions, different terms of contract, or different dates, it would upset the apple cart, and the employers were trusting the union not to upset the apple cart.

Subsequently, when the DMCA attempted to negotiate with some of the same unions that participated in the multi-trade bargaining, its representatives, Petitioners Vandervennet and Snyder, were told by business agents for the Metropolitan Executive Committee of Bricklayers—co-conspirators in this action—that the union had made agreements with the multi-trade employers group for a dollar per year for a two-year contract and had agreed there would be no higher or lower agreements made with anybody else.

Further, Mr. Snyder was told by the bargaining agent for the locals representing laborers and hod carriers, that they "had made a deal with the AGC and Builders Association, on the agreement, that we were to sign that, or we didn't have any men."

In addition, approximately four months after the multi-trade Agreement,on May 27, 1970, when it appeared that the laborers' unions might settle with the DMCA on different terms, Mr. Dailey called a special meeting of the negotiating committee—both employer and employee representatives—by telegram. He called the meeting because he had heard that the agreement might be different from the multi-trade agreement. He did so because of fear of the effect a different agreement might have on the multi-trade bargaining process. Mr. Dailey stated that one of his major concerns was that this might cause an end to multi-trade bargaining.

The practical and intended effect of the Agreement was that Petitioners have been unable to negotiate for wages and fringe benefits for bricklayers and laborers that they directly employ, except upon the terms and conditions of the Agreement in which they did not participate. As a result, Petitioners and

others similarly situated were forced, in order to remain in business, to pay higher wages and fringe benefits than otherwise would have been the case.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Has Decided A Question Of First Impression In Any Federal Court—The Standard Of Admissibility Of Co-Conspirators' Statements In Civil Cases—Which Should Be Decided By This Court Because Of The Importance Of The Issue To The Trial Civil Cases

At trial, the district court conditionally admitted two out-of-court statements made to the Petitioners by union bargaining agents. *See* p. 6 *supra*. The Respondents argued that the statements were inadmissible hearsay while Petitioners argued that the statements were not hearsay under Fed. R. Evid. 801(d)(2)(E)[1] as "statement[s] of a co-conspirator of a party during the course and in furtherance of the conspiracy." The statements were ultimately not admitted into evidence on the basis that Petitioners had not proven the existence of the conspiracy by a preponderance of the evidence. The court therefore granted a directed verdict at the close of the Petitioners' case.

The irony is that with the co-conspirators' statements in evidence, the case clearly would have gone to the jury. In granting the directed verdict, the District Court stated that if it admitted into evidence the co-conspirators' statements, there was sufficient evidence to allow the case to go to the jury. However, the Court held that to allow the co-conspirators' statements in evidence, the Petitioners would have to first prove the existence of the conspiracy by a preponderance of the evidence. This Petitioners had not done, the Court said,

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[1] Fed. R. Evid. 801(d)(2)(E) states that "[a] statement is not hearsay if— * * * (2) The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

and, therefore, it must direct a verdict for Respondents. The District Court said:

> "I don't think there is any question there was a conspiracy or an agreement between somebody; whether it's a conspiracy in the illegal sense of the word I'm not going to express an opinion at the moment but there had to be for this chain of events, there must have been some kind of agreement or meeting of the minds between union people or this could not have occurred. I don't think there is any question. I'm satisfied by a preponderance of the evidence that when the Detroit Mason Contractors Association sat down with the bricklayers and the material workers, the laborers unions that there was underlying that a feeling of commitment by the union people that they were obligated to hold out. I don't think that it would have occurred quite the same way it did and there wouldn't have been quite that hard a position taken by them unless they felt a commitment to somebody."
> App. B., *infra*, 32a-33a.

The District Court continued:

> "The real question is who was that commitment to and with, and essentially, in the final analysis, you have a group of defendants or some of them parties to such an agreement. That is one real distinct possibility. There are two bits, two or three things that indicae that is a possibility, is that it is definitely in the interest of the Associated General Contractors and the CEC to have the union hold in their mind, they wanted this concept to work, but that is common sense, there is nothing wrong with wanting it to work. Then there is a statement made by the union people, and I believe it occurred and I don't remember the names, but I do believe that some one or two of the union people told Mr. Snyder—I believe this to be credible—that they said they were committed to the AGC. . . .
>
> "The most damaging evidence of all, and I don't think we will ever know what happened, that there was a meeting of the minds, was Mr. Dailey's contract. I don't know what occurred; I could guess what occurred if his lawyer ever found out about it, but with his lawsuit pending, about the existence of a contract—of a telegram like that, that is what I meant, with a lawsuit pending over alleging a conspiracy to call a meeting with your alleged co-

> conspirators and ask why the hell did you do something that we allegedly didn't expect you to do, would be pretty damn damaging, if you pardon the expression, and I would say this, that I think there is enough evidence, if all of this evidence is in, to take that issue to the jury, I think the jury could find that there is such a conspiracy, at least with some of the defendants."
> App. B., *infra*, 33a, 34a.

The District Court stated further:

> "[B]ut, gentlemen, I do not find as a fact that there was such a conspiracy. I am just not convinced myself by a preponderance of the evidence."
> App. B., *infra*, 34a.

The District Court concluded:

> "I think there is evidence, if we consider all this together, of the conspiracy; that if I don't strike the certain evidence under *Enright*, even though I don't find the facts myself, I believe a jury could come to a different conclusion and I would give it to the jury, the issue of whether or not there was a conspiracy."
> App. B., *infra*, 35a.

The Sixth Circuit affirmed, holding that the proper standard for the district court to use in deciding the initial question of the existence of a conspiracy was the "preponderance of the evidence" test. App. A., *infra*, 13a. In so doing, the Court of Appeals followed its earlier decision in *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978), which required the preponderance of the evidence test in a criminal conspiracy trial.

This issue of the test governing the admissibility of co-conspirators' declarations in civil cases is a question of first impression which this Court has not, but should, resolve. It is a question which is critical to any civil conspiracy case, but particularly so to civil antitrust cases.

In *Enright*, 579 F.2d at 985, the Sixth Circuit recognized that "the fact-finding responsibilities of the judge and jury are distinct." That premise in *Enright* led the court to conclude that the criminal trial judge's ruling should be based on a lesser standard than that required from the jury. Thus, the criminal

trial judge's determination of the existence of a conspiracy must be based upon a preponderance of the evidence.[2]

In determining whether the test should be a *prima facie* test, a preponderance of the evidence test, or the reasonable doubt standard suggested by Judge Weinstein, the *Enright* Court stated:

> The preliminary question—the existence of a conspiracy and the defendant's participation in it—may also coincide with an ultimate question of fact for the jury if a conspiracy is charged in the indictment. Nevertheless, the fact-finding responsibilities of the judge and jury are distinct. As Judge Coffin correctly noted in [*United States* v.] *Petrozziello* [548 F.2d 20 (1st Cir. 1977)], the trial judge is ruling on the admissibility of evidence, not guilt or innocence, and should not be bound by the reasonable doubt standard which guides the jury's deliberation. 548 F.2d at 23. This same point was made in cases prior to the Federal Rules of Evidence. 579 F.2d at 985-86.

The *Enright* Court concluded:

> In conclusion, therefore, we align ourselves both with the holding and the logic of the First Circuit, in *Petrozziello:*
>
> Although the prima facie standard is no longer appropriate [in a criminal case], we see no reason to require that conspiracy be proved beyond a reasonable doubt. That is the standard the jury will apply to the evidence as a whole. The judge is ruling on admissibility, not guilt or innocence; the government's burden need not be so great. 579 F.2d at 986.

In *United States* v. *James*, 590 F.2d 575 (5th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979), the Fifth Circuit used the same reasoning as *Enright* to reach the same conclusion. The Fifth Circuit adopted the position that the standard for admissibility

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[2] As the Sixth Circuit correctly points out, the *Enright* decision was based in part upon an analysis of Fed.R.Evid. 104(a) and 104(b). Determining that Fed. R. Evid. 104(a) controls, however, does not dictate that a preponderance of the evidence test be used in civil cases.

of evidence should not be the same as the standard for the finding by the ultimate trier of fact. Inasmuch as a jury must find the defendant guilty beyond a reasonable doubt, it was sufficient that the government meet a preponderance of the evidence test for the admission into evidence of co-conspirators' statements.

In applying the *Enright* standard to civil cases, the Sixth Circuit therefore adopted the result of *Enright* and *James*, in defiance of the logic of the cases. Applying the preponderance of the evidence test to the threshold determination by the civil trial court usurps the fact-finding function of the jury. As happened in this case, the District Court essentially has ruled on liability issues, not upon the admissibility of evidence. The Sixth Circuit rationalized its conclusion by stating that applying the *Enright* rule in civil cases is desirable because it "provides a uniform standard for determining admissibility of co-conspirators' declarations in both civil and criminal contexts." App. A, *infra*, 12a. The Sixth Circuit's rationalization of its holding only blurs the analytical distinctions which were the underpinning of *Enright* and *James* and raises stringent standards inappropriate to a civil setting.

There is no uniformity in the jury standard for finding liability—preponderance of the evidence—and finding guilt in criminal cases—beyond a reasonable doubt. Therefore, it is highly prejudicial to a plaintiff in a civil case to face the same threshold standard for admissibility of co-conspirators' statements as the government faces in a criminal case.

II. The Decision Of The Court Of Appeals In An Antitrust Action To Which The Labor Exemption Is Not Applicable, That A Plaintiff Must Nevertheless Prove Specific Predatory Intent Directed At The Businesses Of The Plaintiffs In Addition To The Usual Elements Of An Antitrust Violation, Is In Direct Conflict With The Decision Of Another Court Of Appeals And With Decisions Of This Court.

In its opinion, the Sixth Circuit found that there was insufficient evidence to support a jury finding that the Respondents intended to drive the Petitioners out of business. The Court held that for the Petitioners to prove an antitrust violation, there had to be proof of specific predatory intent directed at the businesses of the individual Petitioners and the class they represent. App. A., *infra*, 19a. This holding is in direct conflict with the decision of the Third Circuit in *Larry V. Muko, Inc.* v. *Southwestern Pennsylvania Building & Construction Trades Council*, 670 F.2d 421 (3d Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3804 (U.S. Mar. 26, 1982) (No. 81-1798), and with decisions of this Court. *Ramsey* v. *United Mine Workers*, 401 U.S. 302 (1971); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

The Petitioners have alleged and presented evidence to prove that the Respondents and trade unions agreed on a wage level and agreed to impose that wage level on Petitioners. These allegations raise two issues. First, is the activity complained of within the statutory or nonstatutory labor exemptions from the antitrust laws? Second, if not, does the activity constitute an antitrust violation?

The Sixth Circuit concluded that the Respondents did not fall within the labor exemption from the antitrust laws. App. A., *infra*, 14a n.10, 15a. Having so decided, however, the Sixth Circuit added an additional element to proof of antitrust violations in labor cases under Section 1 of the Sherman Act which is not present in non-labor antitrust cases. The Sixth Circuit, therefore, has imposed upon the Petitioners the burden not simply of proving the usual elements of an antitrust violation,

but also of proving predatory intent as "a necessary element for an antitrust violation arising from a union's commitment to employers to establish an industry-wide wage scale." App. A., *infra*, 18a. The Sixth Circuit has thus created its own special category of labor exemption from the antitrust laws.

The Sixth Circuit reaches its conclusion while recognizing this Court's precedent to the contrary. In referring to *Ramsey* v. *United Mine Workers*, 401 U.S. 302 (1971), the Circuit Court said,

> [a]lthough the Court did not specifically address the issue whether predatory intent was a requirement to a finding of antitrust liability, Justice White stated:
>
> > Where a union, by agreement with one set of employers, *insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers*, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct.
>
> App. A., *infra*, 17a, *quoting* 401 U.S. at 313. (Emphasis added by Circuit Court.)

The Circuit Court then acknowledged that Justice White's statement "could conceivably be read broadly enough to substitute harmful effect for predatory intent as an element of the antitrust violation." *Id.* The Court, however, declined to read *Ramsey* in that way. Instead, it created a new test for antitrust liability in labor cases—predatory intent.

This decision of the Sixth Circuit is also in direct conflict with *Larry V. Muko, Inc.* v. *Southwestern Pennsylvania Building & Construction Trades Council*, 670 F.2d 421 (3d Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3804 (U.S. Mar. 26, 1982) (No. 81-1798). In *Muko*, a nonunion general contractor sued a fast food chain and two labor organizations, alleging that the defendants had agreed to award contracts for building the fast food branches only to union contractors. The plaintiff claimed that the alleged agreement was a group boycott and a *per se* violation of Section 1 of the Sherman Act. After a trial solely on the issue of liability, the jury found an agreement had been

reached but the agreement was not an unreasonable restraint of trade. 670 F.2d at 424. On appeal of the jury verdict, the first issue the Third Circuit addressed was the proof required to show an antitrust violation.

The Third Circuit expressly reaffirmed an earlier holding in *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980), that the determination of the applicability of an antitrust exemption is separate from determining the existence of an antitrust violation. 670 F.2d at 426. In deciding whether a particular activity is a *per se* violation of the antitrust laws, a court should employ the same analysis used in any market to conclude that conduct of a certain type invariably restrains competition. *Id.* The Third Circuit's view is that

> it is unnecessary, if not improper, to weigh 'labor's legitimate interest in the collective bargaining process' twice—once in determining the labor exemption and again in deciding the antitrust liability question. 670 F.2d at 427.

Therefore, once the Third Circuit has found that the labor exemption does not apply, "traditional antitrust principles" will be used to evaluate the challenged activity. As a result, in *Muko*, no requirement of specific predatory intent was imposed on the plaintiff. In so holding, *Muko* follows the principles announced by this Court in *Ramsey* and *Pennington*, which the Sixth Circuit has declined to do.

Historically, predatory intent has played no part in Section 1 cases where impact upon competition, not competitors, is key. The Sixth Circuit's apparent determination to shield arrangements between management and labor from antitrust liability has far expanded the boundaries of the exemption that Congress has determined to be appropriate in this field. Once a plaintiff has produced evidence which takes the challenged activity outside the labor exemption, there is no rationale to add additional requirements for the proof of an antitrust case simply because the agreement at issue is related to union activities.

CONCLUSION

Petitioners respectfully urge this Court to grant this petition.

Respectfully submitted,

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